

Court of Appeals, Division II

Oral Argument Summaries

Hearing of March 19, 2007

Location: St. Martin's University
Panel: Jj. Armstrong, Hunt, Penoyar

9:00 AM

345714 **Thurston County**
Harold Roberts et ux, Respondents v. Robert Dunn et ux, Appellants

Litigants:

Dunn, Robert & Shirley (Appellant)
Roberts, Harold & Enid (Respondent)

Attorney of Record:

Jon Emmett Cushman
Timothy Lee Ashcraft

Nature of Action:

Appeal in action against adjacent landowner under the anti-harassment statute. The trial court found trespass, nuisance, harassment, and outrageous conduct and awarded monetary damages, injunctive relief, and attorney fees.

Factual Summary:

In 1994, Robert and Shirley Dunn sold their adjacent beachfront property on Bliss Beach Road to Harold and Enid Robert.

In 1998, the Roberts began building a home on the land. Charles Dunn, the Dunns' son, negotiated the transfer of more property to the Roberts in order to accommodate Thurston County's requirements for permeable surfaces. The Roberts installed a sand filter as part of their septic system on the Dunns' property. An easement allowed the installation and provides on-going access to inspect, maintain, and repair that sand filter.

In 2002, after Robert Dunn died, Shirley Dunn sued the Roberts, disputing the validity of this easement. The parties settled. Dunn now argues that the settlement requires the Roberts to apply for a waiver of the sand filter requirement for their septic systems so that the sand filter portion of the easement may be converted to a pipeline easement. But the Roberts never applied for a waiver and claim that Dunn verbally waived this requirement.

In 2003, the Roberts sued Dunn for breach of contract, alleging that Dunn placed garbage cans and a compost bin against the Roberts's wall, erected a 12 foot high scaffolding, "took over" their locking mailbox by painting her name on the box and receiving mail there, floated large logs onto the Roberts's beach, allowed her dogs to roam onto the Roberts's property, fraudulently filled out 70 magazine subscriptions in their name, and built a firewood pile that blocked access to the sand filter.

The trial court denied the Roberts's request to enjoin Dunn from having fires on the beach in their outdoor fireplace.

In 2004, the Roberts again sued Dunn, this time under the anti-harassment statute, alleging similar claims but arguing that res judicata does not bar the claims because they are based on anti-harassment, not contract. The trial court ruled in the Roberts's favor and Dunn appeals.

Issues:

1. Did the trial court abuse its discretion when it concluded that the 2002 settlement agreement only required an "exploration of alternatives"?
2. Did the trial court abuse its discretion when it awarded permanent injunctive relief, damages, costs, and attorney fees under the anti-harassment statute when the statute does not provide for (1) permanent injunctions absent the trial court making specific findings, and (2) awards of general damages unless the plaintiff follow the petition and hearing procedures?
 - a. Even if the trial court had the authority to award permanent injunctive relief under the anti-harassment statute, was it beyond the scope of the statute to enjoin activities that took place entirely on the Dunn property?
 - b. Even if the trial court had the authority to award general damages under the anti-harassment statute, was it an abuse of discretion to award \$5,000 in general damages for multiple activities without specifying which part of the award was based on nuisance and which part of the award was based on harassment?
3. Does the doctrine of res judicata bar re-litigation of the Roberts's claims?
4. Did the trial court abuse its discretion when it imposed a "view easement" servitude on the Dunn property in favor of the Roberts's property?
5. Did the trial court err when it found that the placement of the "firewood wall" by Dunn amounted to a nuisance when the structure was located entirely on Dunn's property?
6. Did the trial court abuse its discretion when it denied the Roberts's motion (1) to amend their pleadings and (2) to consolidate a second lawsuit to allow adjudication of Dunn's easement rights over the Roberts's driveway in the present lawsuit, but entered a permanent injunction restricting Dunn's use of the Roberts's driveway?
7. Did the trial court abuse its discretion when it awarded the Roberts costs and attorney fees under the anti-harassment statute?
8. Did the trial court abuse its discretion when it entered judgment against Shirley Dunn, including \$5,000 in general damages and \$10,850 in damages for magazine subscriptions when there was no finding of fact holding Shirley Dunn liable for damages for the fraudulently filled out magazine subscriptions?
9. Did the trial court err when it granted the Roberts's contempt motion?

Litigants:

McKinlay, Jonathan J. (Appellant)
State of Washington (Respondent)

Attorney of Record:

Thomas Edward Doyle
James C. Powers

Nature of Action:

Jonathan McKinlay appeals his conviction for second degree assault while armed with a deadly weapon.

Factual Summary:

McKinlay and a group of friends went to a bar called the Bar Code where Darryl Spahr and Armand Ruffin were bouncers. A patron of the bar observed McKinlay and his friends carrying bar stools out of the bar and immediately informed Spahr, who went outside to retrieve the bar stools. As Spahr approached, McKinlay swung at him, striking him in the face. Spahr immediately called for Ruffin to help. Ruffin ran up and used his forearm to knock the defendant to the ground. When McKinlay started to get up, Ruffin knocked him back down and tried to hold him down. One of McKinlay's friends hit Ruffin with her purse, causing Ruffin to lose his grip. At that point, McKinlay pulled out his knife and swung it at Ruffin, slicing into Ruffin's left shoulder. After McKinlay stabbed Ruffin, Spahr confronted him and McKinlay stabbed Spahr in the abdomen, perforating his abdominal cavity.

McKinlay told detectives that he hit Spahr in the face when he saw him running toward him and that Ruffin then took him to the ground, where both Spahr and Ruffin hit and kicked him. At this point, according to McKinlay, he pulled out a pocket knife and slashed it at the two men who were kicking him in order to defend himself.

At trial, McKinlay's attorney proposed a no-duty-to-retreat jury instruction. The court declined to submit the instruction because (1) the instruction was not appropriate given the facts at issue in the case, and (2) other instructions provided McKinlay with sufficient ability to argue his self-defense theory. McKinlay's attorney also proposed a jury instruction on the right of a person to reasonably act on appearances in defending himself if he believes he is in danger of "great bodily harm." On appeal, McKinlay argues that this was ineffective assistance of counsel for failing to use "injury" instead of "great bodily harm." McKinlay's counsel also failed to object to a "first aggressor" jury instruction.

Issues:

1. Did McKinlay's attorney render ineffective assistance of counsel when he proposed a jury instruction on self-defense using the phrase "great bodily harm"?
2. Did McKinlay's attorney render ineffective assistance of counsel when he failed to object to a "first aggressor" jury instruction?
3. Did the trial court err when it found that the evidence did not justify a "no duty to retreat" jury instruction?

10:00 AM

343011

Thurston County

Floor Express, Inc., Respondent v Margaret P. Daly et al, Appellants

Litigants:

Associated General Contractors (Amicus Curiae)
Daly, Margaret P. & John Doe (Appellant)

Floor Express, Inc. (Respondent)

Attorney of Record:

John Stephen Riper
Jon Emmett Cushman
Benjamin D Cushman
Richard L. Ditlevson
Matthew G Johnson

Nature of Action:

Floors Express, Inc., a subcontractor, sued Daly for payment. Daly appeals the dismissal of her counterclaim against Floors Express.

Factual Summary:

Providence Mother Joseph Care Center hired Daly to design and remodel their facility. As a general contractor, Daly entered into a contract with subcontractor Floors Express to install flooring at Mother Joseph. Initially, Floors Express sued Daly for money due and against her bond. Floors Express claimed that Daly owed the company for the cost of floor installation and restocking.

Daly answered, denying that money was due, claiming that Floors Express improperly installed the flooring and seeking damages. Her counterclaim alleged that Floors Express installed a product that did not meet Mother Joseph's specific needs.

The trial court dismissed Daly's counterclaim, ruling that Daly did not have standing to pursue a counterclaim for Mother Joseph's damages because Mother Joseph was the party in interest, not Daly and, thus, the joint defense and prosecution agreement between Daly and Mother Joseph did not give Daly standing.

Issues:

1. Did the court err in dismissing Daly's counterclaim against Floors Express, Inc. for lack of standing when Daly did not join Mother Joseph Care Center in litigation?
2. Is Mother Joseph a necessary and indispensable party to an action between Daly and Floors Express, Inc.?
3. Did the joint defense and prosecution agreement allow Daly to pursue a counterclaim against Floors Express, Inc. without Mother Joseph's participation?
4. Did Floors Express' summary judgment motion include proper notice and citation of a legal standard?

11:00 AM

303361

Thurston County

State of Washington, Respondent v Shawn D. Dunkelberger, Appellant

Litigants:

Dunkelberger, Shawn D. (Appellant)
State of Washington (Respondent)

Attorney of Record:

Robert Mason Quillian
Jon Tunheim

Nature of Action:

Appeal from order denying motion to withdraw guilty pleas to one count of first degree child rape and two counts of first degree child molestation.

Factual Summary:

The State originally charged Dunkelberger with one count of first degree child rape and four counts first degree child molestation. As part of a plea agreement, the State dropped two of the molestation charges and Dunkelberger pleaded guilty. In his motion to withdraw his guilty pleas, Dunkelberger claims that he was not aware that he would receive an indeterminate sentence; that is, he did not know that the Indeterminate Sentence Review Board could keep him in prison for life.

After Dunkelberger filed his opening brief, this court granted the State's motion to remand for an evidentiary hearing on the question of voluntariness. The State now challenges several of the factual findings from that hearing.

Issues:

1. Did Dunkelberger show there was a "manifest injustice" entitling him to withdraw his guilty pleas?
2. Did Dunkelberger waive his right to appeal by failing to object at the sentencing hearing?
3. Does the record support the trial court's findings of fact and do they in turn support the conclusion that Dunkelberger's pleas were knowing, voluntary, and intelligent in that he had notice of the potential life-long confinement?

1:30 PM

352478**Pierce County****Charles and Patricia Sales, Appellants v Weyerhaeuser Company, Respondent**

Litigants:

Sales, Patricia (Appellant)

Sales, Charles (Appellant)

Weyerhaeuser Company (Respondent)

Attorney of Record:

Matthew Phineas Bergman

David S Frockt

Brian F Ladenburg

Matthew Phineas Bergman

David S Frockt

Brian F Ladenburg

John Wentworth Phillips

Elizabeth Pike Martin

Diane J. Kero

Nature of Action:

Personal injury action against Weyerhaeuser Company for indirect exposure to asbestos fibers resulting in mesothelioma. Trial court dismissed on basis of forum non conveniens.

Factual Summary:

After Arkansas resident, Charles Sales, was diagnosed with mesothelioma, he sued Weyerhaeuser, claiming that his father exposed him to asbestos fibers by bringing asbestos dust into the family home after working at a Weyerhaeuser mill in Mountain Pine, Arkansas. Weyerhaeuser filed, and the trial court granted its motion to dismiss based on forum non conveniens.

Issues:

1. Did the trial court abuse its discretion by granting Weyerhaeuser's motion to dismiss and denying Sales' motion for reconsideration?
2. Did the trial court properly decide that the forum non conveniens private interest and public interest factors favor an Arkansas forum?
3. Did Weyerhaeuser prove that Arkansas is an adequate alternate forum?
4. Did the court err by not requiring Weyerhaeuser to agree to litigate in Arkansas as a condition of dismissal?
5. Did the trial court err by not considering if the case would be destined for a Federal Multi-District Litigation Panel upon dismissal?